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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 441

MELVIN TANZER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Comes now Melvin Tanzer and petitions this Honorable Court for a writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit, and in respect thereto respectfully sets forth as follows:

Opinion and Judgment of Lower Court.

The Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit, Cause No. 15597, was rendered and entered on August 14, 1958, a copy of which is appended hereto. A certified copy of the Transcript of Record of the proceedings in the United States Court of Appeals for the Ninth Circuit under Rule 21 of the Revised Rules of the Supreme Court of

the United States was duly filed with the Clerk of this Court.

By said Opinion and Judgment the United States Court of Appeals for the Ninth Circuit affirmed the judgment of the United States District Court for the District of Arizona, which judgment was based on the verdict of the jury in said District Court finding the defendant, petitioner herein, guilty of violation of 21 U. S. Code 173 relating to the importation of a narcotic drug.

Order Granting Extension of Time for Filing Petition for Writ of Certiorari.

Application for extension of time within which to file petition for writ of certiorari was duly filed on September 10, 1958, and which was within thirty days of the Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit.

An order was duly made on September 12, 1958, by Mr. Justice William O. Douglas, Associate Justice of the Supreme Court of the United States, extending the time for the filing of this petition for writ of certiorari to and including October 13, 1958, pursuant to Rule 37 of Federal Rules of Criminal Procedure, 18 U. S. C., and United States Supreme Court Rules 22 and 23.

Statutory Provisions Invoking Jurisdiction of This Court.

1. Jurisdiction of the United States Supreme Court.

The jurisdiction of this Court is invoked in this cause under Section 240a of the Judicial Code, as amended, Title 28, U. S. C. Section 1254 (see Appendix), and by virtue of which the Supreme Court may review cases in the courts of appeal by the granting of writs of certiorari.

Questions Presented.

There are four questions presented for review:

1. Whether the Court of Appeals erred when it affirmed the judgment of the trial court though it was patent error in Federal cases for a trial judge to fail to give an instruction on evidence of good reputation even if the petitioner did not request the same?

It is the contention of petitioner that where evidence of good character, reputation for truth, honesty and integrity would tend to support a theory of innocence that it is the duty of the Court to instruct on the question of reputation, even though not requested by petitioner.

2. Whether the Court of Appeals erred when it affirmed the judgment of the trial court though it was patent error for the trial court to admit testimony of a government witness in rebuttal which tended to prove a separate offense independent of the offense for which the petitioner was then being tried and which had no connection whatsoever with the case at bar?

It is the contention of petitioner that the Court erred in permitting the government to introduce evidence in rebuttal to the effect that some time prior to the time in the instant case the petitioner had delivered to said government witness a narcotic kit and told him that he, the petitioner, hid another narcotic kit in a service station.

Petitioner contends this testimony was highly prejudicial and was evidence which tended to prove a separate offense, to-wit: possession of a narcotic kit, and which offense was independent of the offense for which petitioner was then being tried and which had no connection whatever with the crime for which he was then being tried.

Petitioner contends that this rebuttal testimony was a collateral attack in no way connected with the charge in the indictment and that the government was bound by the answer given on cross-examination.

3. Whether the Court of Appeals erred when it affirmed the judgment of the trial court though it was patent error for the trial court to admit into evidence an exhibit which was not properly identified, in that evidence of continuity of contents of the government's exhibit must be presented as well as continuity of possession of the government's exhibit before an exhibit can be properly admitted?

It is the contention of petitioner that the government's exhibit was not properly admitted into evidence because it was not properly identified, as while the evidence shows a continuity of possession there was no showing that the contents remained the same.

Petitioner contends that the lack of evidence that the contents of the package were the same is fatal to the government's case and that the exhibit cannot then be properly admitted into evidence.

4. Whether the Court of Appeals erred when it affirmed the judgment of the trial court though it was patent error for the trial court to sentence the petitioner to serve a term of ten years for the commission of the alleged crime, in that, between the time of his arrest for the case at bar and his trial therefor Congress increased the punishment of said crime? That by virtue thereof he should not have been sentenced as a second offender under the amended Act, and that such increase of punishment as to this petitioner is *ex post facto*.

It is the contention of petitioner that his punishment in the instant case was increased by congressional statute

subsequent to his first conviction, and that such an increase of punishment is *ex post facto* and a violation of law and a denial of due process. The petitioner contends that he was a first offender under the intents and purposes of the amended Act.

Constitutional Provisions and Statutes.

Article I, Section 9, of the United States Constitution (see Appendix):

> "No Bill of attainder or ex post facto law shall be passed."

Fifth Amendment to the United States Constitution (see Appendix):

> ". . . nor be deprived of life, liberty, or property without due process of law . . ."

Title 21, United States Code, Section 173 (see Appendix):

> "It is unlawful to import or bring any narcotic drug into the United States . . ."

Title 21, United States Code, Section 174 (see Appendix):

> "The district courts of the United States shall have original jurisdiction, exclusive of the Courts of the States, of all offenses against the laws of the United States."

18 U. S. Code, Sec. 3231:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, the District Court

of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

28 U. S. Code, Sec. 1291.

"Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:

(1) From a district court of the United States to the court of appeals for the circuit embracing the district; . . ."

28 U. S. Code, Sec. 1294.

Statement of the Case.

Melvin Tanzer was stopped at the Customs Gate at Nogales, Arizona, when he returned from Mexico in May, 1956. He was questioned by State of Arizona officers and United States Customs Agents and was accused of being a narcotic addict, in that they contended that he had just returned from Nogales, Sonora, Mexico, where he had allegedly just received an injection of narcotics. The officers told the petitioner that they would like to apprehend a well-known and notorious Mexican national narcotics distributor, and whose identity was known to all as Pancho Francisco. [T. R. 49.]*

It was agreed that petitioner would work for the United States Customs Office and assist them in any way to effect the arrest of said Pancho Francisco, and it was further agreed that there would be another meeting in Nogales, Arizona, on June 4, 1956. At that time petitioner was advised by the officers that he would be given

*T. R.—Transcript of Record.

a reward from the United States Government in payment for his trouble as an informer. [T. R. 50.]

There was a meeting on June 4, 1956, in Nogales, Arizona, and petitioner stated that the said Pancho Francisco would deliver a pound of heroin into the United States, but at a date not yet settled.

On the 12th or 13th of June, 1956, petitioner again came into the United States Customs Agents' Office at Nogales, Arizona, and also present at that time were the two State of Arizona officers. [T. R. 52.]

Petitioner at that time turned over to State Agent San Angelo a small package, stating: "It's a sample to show that this fellow has the stuff." [T. R. 50.]

The United States Customs Agents did not arrest petitioner for bringing this package of narcotics from Mexico, and neither did the State of Arizona agents, for the reason that as United States Customs Agent Leonard Viles stated:

> "He was working with us and he brought it out and declared it and it was taken by a State Agent, and I knew it wasn't going to enter into any domestic commerce. I had hopes of arresting a larger violator, and I didn't make any arrest at that time." [T. R. 56.]

On June 19, 1956, petitioner again met with the law enforcement officers in Nogales, Arizona, and again reported the condition of the negotiations between Pancho Francisco and himself relative to the smuggling by Pancho Francisco of narcotics into the United States to the end that the Mexican narcotic distributor could be apprehended by the United States authorities.

On June 22, 1956, there was a further meeting in Nogales, Arizona, and the agents advised petitioner that they had to have something definite as the various meetings held were not accomplishing anything.

On July 23, 1956, petitioner was stopped at the Inspection Station on Grande Avenue, Nogales, Arizona, and searched, and at that time he stated that the narcotics, identified as Government's Exhibit 2, were being brought over for United States Customs Officer Leonard Viles.

Petitioner vigorously contended that the narcotics were brought over pursuant to his understanding with said State of Arizona Agent San Angelo and the United States Customs Agents.

Respondent contends that the bringing of the narcotics was an act of petitioner's own doing.

The petitioner was indicted and brought to trial in the United States District Court for the District of Arizona, at Tucson, Arizona.

The trial court admitted Government's Exhibit 2 into evidence, despite petitioner's objections that it was not properly identified.

The evidence shows that while there was continuity of possession of the said exhibit, that there was no evidence whatsoever to show that the contents of the package remained the same, and petitioner contended that lack of evidence that the contents of the package were the same rendered the exhibit inadmissible.

The respondent was permitted, over strenuous objection, to introduce evidence in rebuttal that the petitioner had delivered to a government witness a narcotic kit, which evidence tended to prove a separate and distinct

offense independent of the offense for which petitioner was then being tried and which had no connection whatsoever with the case at bar.

The jury returned a verdict of guilty, and thereafter respondent filed an information alleging a prior conviction under the narcotic laws, to which petitioner objected and contended that, although he had pleaded guilty to a violation of the narcotic statutes in January, 1953, and Congress had thereafter passed statutes prescribing more severe methods of proceeding against second offenders and setting heavier penalties for a second offender, that it is improper to apply these statutes in sentencing him for a second offense committed in 1956, and further contended that the statutes were as to him *ex post facto* as to a second offense.

Reasons Relied on for the Allowance of the Writ.

1. The writ of certiorari should be granted and the judgment below should be reversed, vacated and remanded because the United States Court of Appeals has decided important questions of criminal law contrary to the general decisions of the Courts.

2. This Court should grant certiorari to decide important questions of procedural law.

3. This Court should grant certiorari in its supervisory capacity in Federal criminal cases.

4. This Court should grant certiorari so that there may be uniform interpretation of the statutes by the Appellate Courts.

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF WRIT OF CERTIORARI.

1.

The Petitioner in the Case at Bar Introduced Evidence as to His Good Character and Reputation. The Trial Court Failed to Instruct the Jury on the Question of the Good Reputation of the Defendant.

Counsel Contends That in Criminal Cases the Court Must Instruct on the Reputation Whether or Not the Court Is Requested to Do So.

The first question arising in the case at bar is whether in the absence of a request for an instruction to the jury as to evidence of the defendant's good reputation did the trial court err in failing to give such instruction when testimony of petitioner's good reputation was introduced into evidence? It surely must be conceded that it is the law in criminal cases that the Court must instruct on all essential questions whether or not the Court is requested to do so. In Federal criminal cases a failure of the trial Court to give an instruction on good reputation when such testimony was admitted into evidence constitutes reversible error.

Where the evidence is *irrelevant*, certainly there is no duty upon the Court to give an instruction to the Jury, and the Courts have indicated that where the evidence is *relevant* the instruction to the Jury should have been given on the issue covered by the evidence.

Springer v. United States, 148 Fed. 411.

Evidence of good character for truth, honesty and integrity would tend to support a theory of innocence, and it is the duty of the Court when such evidence has been admitted to instruct the jury on this question.

In the instant case the character and reputation of the defendant was extremely relevant to the extent that it went to the very essence of his defense in that his good character would support the truth of his statements that he was in truth and in fact working for the Federal officers with their full knowledge and consent.

There were three character witnesses who testified for the petitioner, all of whom stated that his reputation in the community for honesty and integrity as a law-abiding citizen was good.

Thus the reputation of the defendant was an important phase of the evidence. The failure of the Court to instruct on this evidence was highly prejudicial to the defendant due to the fact that his entire defense was predicated upon his honesty and integrity and such an instruction may have caused a reasonable doubt as to the defendant's guilt.

Was the failure of the trial court to give on its own volition an instruction on good reputation, under the circumstances in this case, reversible error?

Petitioner contends that where testimony of relevant issues has been admitted into evidence that it is the duty of the trial court to give an instruction. It should not be that a defendant in a criminal case should be deprived of that mantle of protection of the presumption of innocence, and certainly his good reputation is part of the cloak of innocence, because of failure of counsel to request an instruction on good reputation.

While the learned judge in the trial court did give a "cover-all" instruction "to consider all the evidence" it was insufficient because the functions of an instruction by the Court to the Jury is to convey to the minds

of the Jury the correct legal principles that are to govern them in weighing evidence given to them and that upon their determination of the facts from the evidence that they may apply the correct principles of law and thereby decide correctly and justly between the parties and in accordance with both law and evidence.

An instruction is an explanation of the principles of the law applicable to the case in its entirety and which it is the duty of the Jury to apply in order to render a verdict establishing the rights of the party.

The Jury did not bring the informed understanding of the learned Court and respected counsel into their consideration of the case and it is a duty of the trial judge to impart to the jury all of the law of the case. It is a rule, whether requested or not, that the Court should instruct on every essential question in the case so as to properly advise the jury.

The trial court, or any court, does not have the insight in deliberation of the jury room as to the weight of the testimony of the character witnesses without an instruction given by the Court to guide the jurors, and failure of the trial court to give such instruction is prejudicial to the rights of the accused and is fatal error and it constitutes a denial of the rights of due process to the defendant. Who is to say what the effect of such an instruction would have upon the minds of the jurors?

The question of reputation is an integral part of the makeup of a person insofar as the crime involving moral turpitude is concerned and it is very relevant and highly probable that one of good reputation is not apt to be a violator of the narcotic laws. The liberty of a defendant should not be a matter of hide-and-seek, that if a counsel has inadvertently overlooked the asking of an

instruction for good reputation, that in such case the defendant should be given the benefit of such an instruction. The mere mental agility of a defendant's counsel or the lack of it, should not be the deciding factor when liberty is involved, rather the trial court is duty bound to take it upon itself in criminal cases to give an instruction, whether requested or not, whenever relevant testimony as to good reputation has been admitted into evidence, and the failure of the trial court so to instruct constitutes reversible error.

It is conceded that any crime involving narcotics is one that is known as *malum per se* and it is thus tainted with moral turpitude and by reason thereof character is a relevant part of the issue at stake. When the issues involve character the Court on its own must specifically give an instruction on reputation because from good reputation good character is inferable, and a defendant is entitled to the benefit of any good inference that a Jury could consider from such an instruction.

Samuels v. United States, 169 F. 2d 787;

United States v. Leroy, 153 F. 2d 995.

Evidence of good character when considered in connection with other evidence in the case may generate a reasonable doubt and a defendant is entitled to have the opportunity to have such doubt of his guilt generate in the mind of a juror and be resolved in his favor.

United States v. Edgerton, 164 U. S. 361, 41 L. Ed. 467.

2.

The Petitioner in the Case at Bar Objected to Introduction of Evidence by the Government on Rebuttal to Contradict the Defendant When It Concerned a Collateral Matter as to Which Inquiries Stopped With the Answers of the Witness. The Court Admitted Such Evidence Over Objection.

The second question arising in the case at bar is that the trial court erred in permitting the government in rebuttal to introduce evidence of a government witness to the effect that some time prior to the time in the instant case the petitioner had delivered to him a narcotic kit and told him that he, the petitioner, had another in his service station. This tended to prove the commission of a separate offense independent of the crime for which the petitioner was then being tried and had no connection whatsoever with the case at bar.

It must be conceded that it is the law of the land that testimony tending to prove a separate offense independent of the offense for which the defendant was then being tried constituted a violation of the defendant's rights and was reversible error.

The law as laid down in *Coulston v. United States* (C. C. A. 10), 51 F. 2d 178, has never been reversed and the law enunciated therein is controlling law and cited as such to this date and it laid down the rule that testimony tending to prove a separate offense independent of the offense for which the defendant was being tried was prejudicial and a violation of defendant's right and constitutes reversible error. The *Coulston* case is a case involving narcotics and the case at bar is one involving narcotics.

In the *Coulston* case the Court permitted an inquiry into a controversy between defendant and a narcotic agent and then on rebuttal the Government was permitted to prove over objections its version of the transaction as well as the further conversation between the agent and defendant over $1,750.00 worth of morphine. The Circuit Court commenting on this case stated that *neither* of the transactions proven on rebuttal had the *slightest connection* with the sale for which defendant was being tried and held that the *admission of such evidence constituted prejudicial error.* We quote the following from the testimony:

> "Tested by these rules, the questions asked on cross-examination of the defendant were improper. That a controversy occurred, some thirteen months after the sale charged, between a narcotic agent and the defendant over the repayment of $25, or that at an unnamed date the two of them had a controversy concerning other morphine, *did not impeach* the *credibility of the witness.* But, even if the cross-examination were proper, the *evidence* received *was not admissible* on *rebuttal* to *contradict defendant,* for it *concerns* a *collateral matter as to which inquiry stopped with the answers of the witness.*"

The text in 20 American Jurisprudence, at page 278, Section 302, states generally that evidence of other acts even of a similar nature must have some connection in some special way with the act charged. The purpose of permitting evidence of a prior conviction is not proof that the defendant is more apt to have committed the crime charged but is for the sole purpose of effecting his credibility.

Evidence that the defendant may have possession of a narcotic kit was introduced by the Government not for the purpose of effecting the defendant's credibility but

for the purpose of convincing the jury that he would be more likely to have committed the crime he was charged with.

We again wish to quote from *Coulston v. United States, supra,* at page 182 of the opinion, in which the Court quoted from an opinion by the Eighth Circuit as follows:

> "The zeal, unrestrained by legal barriers of some prosecuting attorneys, tempts them to an insistence upon the admission of incompetent evidence, or getting before the Jury some extraneous fact supposed to be helpful in securing a verdict of guilty, where they have prestige enough to induce the trial court to give them latitude. When the error is exposed on appeal, it is met by the stereotyped argument that it is not apparent it in any wise influenced the minds of the jury. The reply the law makes to such suggestion is: that, after injecting it into the case to influence the Jury, the prosecutor ought not to be heard to say, after he has secured a conviction, it was harmless."

The foregoing quotation is particularly applicable to the present case. It makes no difference how strong the Government's case might appear, the defendant is entitled to a trial conducted according to the established rules of evidence and prejudicial matter not material should not be admitted.

The defendant was asked on cross-examination if he had ever given to the Government witness, San Angelo, a narcotic kit [T. R. 122]:

> "Mr. Roylston:
>
> Q. Did you have any narcotics equipment or paraphernalia? A. No.

Q. During this time when you were going back and forth to Nogales with San Angelo, did you ever turn over a narcotics kit to him? A. No."

The transcript will further show that the Government witness San Angelo was permitted, over the objections of the defendant, at pages 135, 136 and 137 thereof, to testify in rebuttal about the deliveries to the defendant of a narcotic kit and further that the defendant had another narcotic kit in his service station, and we quote:

"By Mr. Roylston:

Q. I will ask you if Mr. Tanzer at any time ever turned over a narcotics kit to you. A. Yes.

Q. Did he at that time discuss having a narcotics kit at any other place?

Mr. Flynn: I object. No foundation has been laid for any conversation between this witness and the defendant and it certainly could not be proper impeachment. It has nothing to do with the alleged offense in this case. Therefore it is a collateral matter and impeachment foundation should have been laid. . . .

Q. Did Mr. Tanzer at that time tell you he had a narcotics kit at any other place? A. Yes, he did.

Q. What did he tell you in relation to the other kit, as near as you can remember?

Mr. Flynn: May our continuing objection to this line of questioning on the ground that foundation has been laid and not proper rebuttal, and no impeachment foundation laid?

The Court: Very well. The record may so show.

Mr. Roylston: Do you recall the last question? A. No.

Q. (By Mr. Roylston): What did Mr. Tanzer tell you in relation to this narcotics kit other than

the one he turned over to you? A. He told me he had one stashed in a gasoline station."

It is evident that prejudicial error was committed in the trial of this case in the admission of testimony involving transactions which tend to prove commission of a crime other than the one before the bar. It is true that there is a vast body of law that allows introduction of testimony involving commission of other crimes such as sex offenses and crimes involving moral turpitude, but our Courts are zealous in their protection of the rights of the individual citizen when the testimony being introduced which tends to prove the commission of another crime other than the one for which he is being tried.

The crime before the District Court was one involving the importation of narcotics into the United States. The crime for which the testimony admitted into evidence and duly objected to, pertained to the possession of a narcotic kit. The inference to be determined by the Jury was that one who possessed a narcotic kit must have needed narcotics and that he therefore must have been guilty of importing narcotics into the United States.

The proof offered on rebuttal with reference to the possession of a narcotic kit had not the slightest connection with the crime for which the petitioner was being tried. To admit this evidence petitioner contends was prejudicial, and reversible error.

The issue presented was a simple one: did the petitioner import into the United States in violation of law a quantity of narcotics as testified to by the Government witness? These remote and disconnected transactions had no evidentiary bearing on this issue; at best they could serve but to create an atmosphere of hostility and to dis-

tract the Jury from the issue. The Jury could only be confused by the admissibility of proof of other offenses.

Boyd v. United States, 142 U. S. 450, 35 L. Ed. 1077;

Hall v. United States, 150 U. S. 76, 37 L. Ed. 1003;

Cucchia v. United States, 17 F. 2d 86;

Wigmore on Evidence (2d Ed.), Sec. 194;

16 *C. J.*, Sec. 586.

The *Coulston* case further lays down the rule at page 181 of 51 F. 2d that whenever the defendant takes the stand he may be impeached in the same manner and to the same extent as any other witness and no further.

Raffel v. United States, 271 U. S. 494, 70 L. Ed. 1054;

Madden v. United States, 20 F. 2d 289.

Questions asked on cross-examination for the purposes of impeachment should be confined to acts or conduct which reflect upon his integrity or truthfulness, or so "pertain to his personal turpitude, such as to indicate such moral depravity or degeneracy on his part as would likely render him insensible to the obligations of an oath to speak the truth"; when such a *question is asked and answered,* the *inquiry is ended;* the Government is bound by the answer in that it may not, on rebuttal, offer countervailing proof. To this latter rule there is one exception: In criminal cases a witness may be asked, for purpose of impeachment, whether he has been convicted of a felony, infamous crime, petit larceny, or a crime involving moral turpitude, and on rebuttal the record of such conviction is admissible.

But, even if the cross-examination were proper, the evidence received was not admissible on rebuttal to contradict petitioner, for it concerns a collateral matter as to which inquiry stopped with the answers of the witness.

The law as outlined in the *Coulston* case is further upheld in the case of *Lloyd v. United States*, 226 F. 2d at page 9, as follows:

> "Admission of evidence with respect to defendant's offer to compromise income tax and alleged untrue statement was prejudicial to defendant where it indicated to Jury that defendant had cheated on his income tax over a period of years."

The Court held in the case of *Fallen v. United States*, 220 F. 2d 946, as follows:

> "In prosecution under indictment relating to stolen motor vehicle evidence of perpetration of other like offenses was *not* needed to establish criminal motive or intent where proof of commission of act involved carried with it evident implication of criminal intent and constituted *reversible error*."

In a 1955 case arising in the United States Court of Appeals for the Fifth Circuit, *Helton v. United States*, 221 F. 2d 338, involving the disposition of marijuana, the Court there held as follows:

> "It is hornbook that, absent a requirement of showing system or intent, *evidence of offenses not charged in the indictment is not only inadmissible, but prejudicial if admitted* . . . It is true that here the trial court ordered the improper evidence stricken from the record, but he gave no instruction whatever to the Jury to disregard the improper testimony. In fact, in the circumstances of this case, it is doubtful that any instruction, however strong, would have

succeeded in destroying the picture which this remark created in the Jury's mind of the appellant smoking marijuana, with marijuana growing in his back yard, with some in his bedroom and some in his car. The defense in this case suggested that the marijuana found on the appellant's premises was left there by a former roomer. Whatever hope the appellant had of the Jury's accepting that defense was blighted by the admission that appellant himself was a marijuana smoker."

It left the Jury an open door of conjecture when such door should have been barred to them and the case submitted to it by legally admitted evidence. If the improper evidence admitted was calculated to make such an impression on the Jury this Court must reverse the verdict and the cause remanded for new trial.

3.

Does the Failure of the Government to Show That the Contents of the Exhibit Are the Same Render the Exhibit Inadmissible?

The third question arising in the case at bar is that the trial court erred in admitting into evidence the government's exhibit without it being sufficiently identified.

It is contended by counsel that the exhibit introduced by the government was not properly identified in that there was no showing that there was a continuity of condition of the government's exhibit.

It is conceded that there was a continuity of possession but there must likewise be a showing of a *continuity of condition* of the government's exhibit to render it admissible.

There was no testimony introduced at any time that showed that the contents of the package remained the same.

It has been noted throughout the cases studied that the lack of proof that the contents of the package were the same rendered the exhibit inadmissible.

In the case of *Boyd v. United States*, 30 F. 2d 900 at 901, it is said:

> "The officer . . . testified that the *contents* of the bag were then in the *same condition* as when first seized . . . there was *therefore* no error in the admission of the bag and its contents in evidence." (Emphasis ours.)

From all the reasoning in the *Boyd* case, *supra*, petitioner contends that there must be evidence of continuity of condition of the government's exhibit to allow it to be admissible in evidence, and therefore failure of the government to prove this essential element of admissibility bars this exhibit from evidence, and by reason thereof, the trial court committed reversible error.

4.

Is an Amended Act Which Provides for Longer Imprisonment in Cases of a Prior Conviction, Notwithstanding That Such Conviction Antedated the Amended Act, Ex Post Facto?

The fourth question arising in the case at bar is whether or not a statute is *ex post facto* under the following circumstances:

The petitioner in 1953 was convicted of a violation of the Narcotics Laws, having pled guilty, being an addict, received probation, and faithfully, honorably and dutifully fulfilled all terms of probation. Subsequently Congress

passed statutes prescribing methods of proceeding against a second offender and setting penalties heavier for a second offense.

Petitioner contends that it is improper to apply these statutes in sentencing him as a second offender under the amended Act, to wit: 26 U. S. C. 7237 and 21 U. S. C. 174 enacted subsequent to the commission of the petitioner's first offense.

Petitioner contends that insofar as he is concerned the jury's verdict in finding him guilty under the amended Act was his first offense under the amended Act.

Congress has sought to protect the citizens of the United States from the horrors of the narcotic traffic. The records show that Melvin Tanzer was, at his worst, an addict. At no time throughout the Transcript of Record is there one bit of evidence that would associate him with being a vendor or "pusher." [T. R. 48.]

It is respectfully contended that it was the intent of Congress to deter the sale of narcotics by placing heavier penalties in the path of those who would further the traffic of narcotics in the United States and that the intent of the Act was to prevent and bar unauthorized sale of narcotics in the United States.

Congress has failed to make a distinction between a user of narcotics and a vendor of narcotics.

Surely one who is unfortunately addicted to this illness should not be placed in the category of one who is an illegitimate purveyor of narcotics. One is a sick man and the other is a criminal.

Melvin Tanzer, the petitioner, was his own worst enemy and a sick man, and never was a criminal.

The petitioner calls attention to the amended Act which provides for a ten-year minimum sentence with no probation allowed, if he be classified as a second offender under the amended Act.

If he be construed as a first offender his sentence then would be a minimum of five years.

It is contended that it was the intent of Congress to place heavier penalties on anyone who violates the Narcotic Laws after the date of the amended Act.

Congress set up new penalties, and that as to petitioner, who allegedly committed a violation under the amended Act, he was a first offender under the intent and purposes of the amended Act. To determine otherwise would be an injustice, in that the Act of Congress has increased the malignancy of the crime.

It is axiomatic that Congress shall not pass any law after a crime has been committed by any citizen increasing the malignancy of the crime.

Article I, Section 10 of the United States Constitution forbids the application of any punitive measures to a crime already consummated to the detriment or material disadvantage of the wrongdoer.

Petitioner therefore respectfully submits to this Honorable Court that the amended Act under which the petitioner was convicted should be construed to mean that the prior convictions referred to are convictions which must have taken place after the amended Act was put upon the statute books. That to otherwise construe would be *ex post facto* and a denial of the petitioner's constitutional guaranties.

That it is a travesty on justice to subject a citizen who has made one mistake (as an addict only), on a con-

viction of a second transgression, to a minimum sentence of ten years as a second offender, when in truth and in fact he never was a second offender under the new amended Act.

The Congress of the United States intended to curtail traffic and subject traffickers in narcotics to maximum sentences by the amended Act.

> "The courts attempt to be courts of justice and not mere courts of law, and in interpreting the law it is the Courts' policy to temper the law with mercy and understanding of humanity and its frailties, thereby making it real justice.
>
> "Real justice would be served if this honorable Court should construe a second offender under the amended Act as one who has once already been convicted under the amended Act. Petitioner is not a second offender under the amended Act, and is entitled to have judgment against him set aside."

Conclusion.

Wherefore, and for the reasons herein stated, petitioner respectfully prays that this Honorable Court issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to the end that the questions involved may be fully presented and argued and justice done in the premises.

Respectfully submitted,

SILVER, SILVER & ETTINGER,

By JAMES J. SILVER,

Attorneys for Petitioner.

APPENDIX A.

Constitutional Provisions and Statutes Involved.

Fifth Amendment to the United States Constitution:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, of in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Title 21, United States Code, Section 173:

"Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; foreitures. It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the board finds to be necessary to provide for medical and legitimate uses only, may be imported and brought into the United States or such territory under such regulations as the board shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

"Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2), if any other narcotic drug, be seized

and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision, shall be placed in the custody of the board and in its discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes."

Title 21, United States Code, Section 174:

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

"Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

APPENDIX B.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Melvin Tanzer, Appellant, vs. United States of America, Appellee. No. 15597.

Aug. 14, 1958.

Upon Appeal from the United States District Court for the District of Arizona.

Before: Healy, Fee and Barnes, Circuit Judges.

PER CURIAM:

Tanzer was convicted upon an indictment charging importation of heroin from Mexico. The trial was fair and impartial, according to the record before this Court. The circumstances were quite dramatic. Tanzer was caught red-handed crossing the border with narcotics. He admitted the possession and crossing the line. He claimed he was bringing the narcotics over to assist the United States Customs Agents. The latter vigorously denied any connection with him at the time, since they had informed him their previous relations were terminated. The jury disbelieved Tanzer.

Defendant introduced reputation evidence of extremely doubtful credibility. He did not request an instruction thereon or except to the failure of the court to give such a charge. He urges this Court is bound to reverse upon this ground, as patent error, although no exception was taken. We disagree.

Defendant claimed he was entrapped. The court fully instructed as to this defense, one of the elements of which is that defendant shall have not previously engaged in the

particular criminal activity at least. In rebuttal of evidence as to entrapment, the government introduced evidence that defendant had previously admitted possession of a narcotic "kit" "stached" in a service station, and had turned over another narcotic "kit" to the officers. This was admissible evidence as tending to negative entrapment. Furthermore, the trial court instructed the jury that defendant was not on trial for any act not alleged in the indictment.

Defendant objects that continuity of possession of contents of the container seized on the border was not proved. The agent who seized it testified flatly that the contents were the same. The question was for the jury.

Finally, defendant contends that, where he had been convicted of receiving, concealing and facilitating transporation of narcotics in January, 1953, and thereafter Congress passed statutes prescribing methods of proceeding against a second offender and setting penalties heavier for a second offense, it would be improper to apply these statutes in sentencing him for a second offense committed in 1956. The provisions in these statutes, 26 U. S. C. A. Section 7237 and 21 U. S. C. A. Section 174, were essentially reenactments of other acts. See Act of November 2, 1951, 65 Stat. 767, and Act of July 18, 1956, 70 Stat. 568, 570. Under these circumstances, the statutes in question were not ex post facto as to the second offense. Cf. Wilson vs. United States, 9 Cir., 205 F. 2d 567, 210 F. 2d 245.

Affirmed.

(Endorsed:) Per Curiam Opinion. Filed Aug. 14, 1958. Paul P. O'Brien, Clerk.

APPENDIX C.

Judgment of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Melvin Tanzer, Appellant, vs. United States of America, Appellee. No. 15597.

Appeal from the United States District Court for the District of Arizona.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed) Judgment Filed and entered: August 14, 1958. Paul P. O'Brien, Clerk.